

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re:	)	Bankruptcy Case
	)	No. 07-63624-fra7
TROY L. PLUM	)	
	)	
Debtor.	)	
	)	Adversary Proceeding
GELCO CONSTRUCTION CO.,	)	No. 08-6041-fra
	)	
Plaintiff,	)	
vs.	)	
	)	
TROY L. PLUM,	)	MEMORANDUM OPINION
	)	
Defendant.	)	

Defendant/Debtor owes Plaintiff Gelco Construction approximately \$300,000, the remaining balance on an unsecured loan. Gelco seeks a judgment for the balance due and alleges in its complaint that the loan was procured through Defendant's fraud, and that the balance due should be excepted from discharge under Code § 523(a)(2)(A). After considering the evidence presented at trial, the court finds for the Plaintiff.

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1 I. BACKGROUND

2 Defendant had an opportunity to purchase a business, PacWest  
3 Engineering ("PacWest"), for \$700,000. The terms of the proposed sale  
4 required that he put \$300,000 down, and pay the balance, with interest,  
5 in one year.

6 Lacking the money to pay the down payment, Defendant approached  
7 Plaintiff and asked for a \$350,000 loan. Plaintiff's manager testified  
8 that the Defendant implied that the \$350,000 was the total purchase  
9 price, and that Defendant had arranged for a loan to repay Gelco after  
10 the sale of the business closed. Defendant's explanation to Gelco was  
11 that he had been told by a loan broker that the loan would be easier to  
12 obtain if Defendant already owned the business. Defendant summarized the  
13 discussion in an e-mail to Plaintiff's manager on May 8, 2007:

14 Thank you very much for going over my proposal for  
15 buying PWE Oregon. After our phone call followed up  
16 with OSU Federal and am very confident that I will be  
17 able to get an SBA loan within 3 months of buying PWE.  
18 If I got a \$350,000 loan from Gelco I propose paying  
19 it back as follows. Initial loan based on 48 months  
20 at 15% for a monthly payment of \$9,740.76. Upon  
21 closing the purchase deal, I would immediately begin  
22 the application process for an SBA loan. I[f]  
23 everything goes [as] predicted I would pay Gelco three  
24 monthly payments after which time my SBA loan would be  
25 approved an [sic] I would pay the loan off in full in  
26 the third month. With the full payoff could pay an  
additional sum for your time and effort.

To help you feel more secure about the loan here is  
some overall financial information about PWE Oregon.

Gross yearly revenue = \$1,000,000.  
Gross year profit = \$350,000.

I appreciate your consideration in this matter and  
look forward to discussing it with you further.

On the strength of these discussions Plaintiff lent Defendant

1 the sum of \$350,000. The loan was funded by a check dated March 23,  
2 2007. No financial statements were requested or offered, and Gelco did  
3 not inquire further into the nature of the business being purchased or  
4 the terms of the sale. There was no further inquiry into Defendant's  
5 financial condition. It should be noted that, while the parties had done  
6 some business together in the past, no formal business relationship  
7 existed between them at the time of the loan.

8 Defendant's purchase of the business closed on June 15, 2007.  
9 Three hundred thousand dollars of the money loaned to him was paid to the  
10 seller. The remaining \$50,000 was used to pay credit card debt  
11 previously owed by the Defendant. Defendant did not disclose to the  
12 Plaintiff this intended use of the loan proceeds prior to the time the  
13 loan was approved. Indeed, it is clear that the Plaintiff believed that  
14 the entire \$350,000 would be used to purchase the business. Plaintiff's  
15 representative testified that, had Plaintiff known of the need to pay  
16 down unrelated debt, or that the total price was twice what they had  
17 understood it to be, the loan would not have been made.

18 Defendant reasons that he needed to spend the \$50,000 to reduce  
19 his credit card debt in order to improve his credit rating to the point  
20 where he could qualify for the SBA loan that would fund his repayment of  
21 the down payment, as well as the balance due on the purchase.

22 After the purchase of the business closed, its prospects, and  
23 the Defendant's, diminished rapidly. Due to a tightening economy and  
24 cutbacks in the construction business, the newly purchased business's  
25 revenues declined sharply. Moreover, despite his payoff of his credit  
26 card debt, Defendant's credit rating never improved to the point where he

1 could qualify for the needed small business loan. Ultimately he was  
2 forced to file for bankruptcy relief.

3 Before filing his petition for relief, Defendant had managed to  
4 pay roughly \$50,000 to Gelco. According to Plaintiff's proof of claim,  
5 there remains a balance due of \$298,414.00.

## 6 II. DISCUSSION

7 Code Sec. 523(a) excepts from discharge a debt incurred  
8 (2)for money, property or services, or an extension,  
9 renewal, or refinancing of credit, to the extent  
obtained by-

10 (A) false pretenses, a false  
11 representation, or actual  
12 fraud, other than a  
13 statement respecting the  
debtors's or an insider's  
financial condition.

14 In order to prove fraud under § 523(a)(2)(A), a creditor must  
15 prove by a preponderance of the evidence the following five elements: (1)  
16 the debtor made a material representation, (2) with knowledge of its  
17 falsity, (3) with the intent to deceive, (4) on which the creditor  
18 justifiably relied, and (5) due to which the creditor sustained loss or  
19 damage. In re Kirsh, 973 F.2d 1454, 1457 (9th Cir. 1992).

20 Under the Code, "false pretenses" contemplates circumstances in  
21 which a course of conduct - as contrasted with an explicit representation  
22 - is intended to mislead. It includes an implied misrepresentation or  
23 conduct intended to create or foster a false impression. In re Cole, 164  
24 B.R. 951(Bankr. N.D. Ohio 1993). Moreover, fraud or false pretenses may  
25 be discerned where the debtor has failed to disclose facts material to  
26 the lender in order to induce the lender to grant credit. In re Roberti,

1 183 B.R. 991 (Bankr. D. Conn. 1995)(Deliberate nondisclosure of a  
2 material fact may amount to a "false pretense" under § 523(a)(2)(A)).

3 Defendant told Plaintiff that he needed \$350,000 to purchase  
4 the business he was interested in. He did not disclose that:

5 (1) the funds being borrowed would only cover the down payment, (2) he  
6 would owe an additional \$400,000, secured by the business, and (3) that  
7 \$50,000 of the funds would be used to pay unrelated debts. He stated  
8 that he required \$350,000 to buy the business, when in fact he needed  
9 \$50,000 to clear up his shaky financial circumstances and \$300,000 to  
10 obtain possession of the business, for which he would continue to owe an  
11 additional \$400,000. While what Defendant represented may have been true  
12 in the strictest sense, it was meant to conceal from the Plaintiff good  
13 reasons not to part with its money.

14 Particularly troubling is Defendants' failure to disclose his  
15 intention to use \$50,000 of the money borrowed to pay existing  
16 indebtedness. Defendant reasoned that paying these debts, being  
17 necessary to enhance his credit and thus facilitate a subsequent loan,  
18 was part of the cost of purchasing the business. This is too much of a  
19 stretch: buying a business, or taking out a loan, and paying down old  
20 debt to enable a purchase are separate matters, particularly insofar as  
21 the Defendant benefitted from the elimination of the old debt whether he  
22 bought the business or not. He was obligated to advise Plaintiff of his  
23 intentions before he induced it to lend the money.

24 Plaintiff's witness testified that, had Plaintiff known of the  
25 nature of the purchase, or of Defendant's need to pay \$50,000 in old  
26 debt, it would not have lent him the money. No doubt Plaintiff (and

1 Defendant, for that matter) would have been spared a lot of grief had it  
2 enquired into the details of the purchase, or of Defendant's financial  
3 strength. However, a creditor's reliance on a prospective borrower need  
4 only be justifiable, not reasonable. Field. v. Mans, 516 U.S. 59(1995).  
5 Plaintiff's negligence in failing to discover the correct circumstances  
6 of the transaction is not a defense. In re Apte, 96 F.3d 1319,1322 (9th  
7 Cir. 1996); In re Kirsh, 953 F.2d 1454 (9<sup>th</sup> Cir. 1992). Defendant was  
8 known to Plaintiff through their good working relationship prior to the  
9 loan, and Plaintiff had no reason to doubt him. Its reliance, while  
10 unfortunate, was justifiable.

### 11 III. CONCLUSION

12 Plaintiff has a claim against Defendant for \$298,414. The  
13 claim was incurred as a result of Defendant's false pretenses, and for  
14 that reason cannot be discharged. A money judgment should be entered for  
15 Plaintiff in the amount of the claim with a determination that the claim  
16 is excepted from discharge.

17 The foregoing constitutes the court's findings of fact and  
18 conclusions of law. Counsel for the Plaintiff shall submit a form of  
19 judgment consistent with this opinion.



21 FRANK R. ALLEY, III  
22 Bankruptcy Judge  
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